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IN THE

# Supreme Court of the United States

October Term, 1971

No. 71-

71-550

AMERICAN AIRLINES, INC.,
*Petitioner,*

and

ALLIED PILOTS ASSOCIATION,
*Intervenor-Petitioner,*

*against*

CIVIL AERONAUTICS BOARD,
*Respondent,*

and

MASTER EXECUTIVE COUNCIL OF THE PILOTS OF TRANS CARIBBEAN AIRWAYS,
*Intervenor-Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, American Airlines, Inc. ("American"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 23, 1971.

## Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix to the petition for certiorari filed by petitioner Allied Pilots Association ("APA"), at A12.* Orders Nos. 71-5-30 and 71-6-71 of the Civil Aeronautics Board, issued on May 7, 1971 and June 11, 1971, respectively, also appear in that Appendix at A32 and A25.

## Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 23, 1971. A motion to stay the issuance of the mandate pending application to this Court for a writ of certiorari was denied by the Court of Appeals on August 3, 1971. This petition for certiorari was filed within 90 days of entry of the Court of Appeals judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## Questions Presented

1. Whether the Civil Aeronautics Board could properly ignore an agreement for the integration of pilot seniority lists reached between the surviving carrier in a merger and the majority representative of its pilots without mak-

* Upper-case "A" references are to the supplemental Appendix to the petition for certiorari filed by petitioner APA, which Appendix is adopted by petitioner American as if fully attached hereto. References followed by a lower case "a" are to the Joint Appendix prepared for the Circuit Court (which has been certified by the Clerk of that Court and filed with these petitions for certiorari). Upper case "R" references are to the transcript of the oral argument before the Circuit Court on July 14, 1971.

ing a finding that such agreement was not substantively fair and equitable.

2. Whether the Civil Aeronautics Board could properly order compulsory binding private arbitration of the integration of seniority lists of pilots of a merged and a surviving air carrier without any guidelines, despite the refusal of the majority representative of the surviving carrier's pilots to participate, and despite the willingness of all parties that the Board resolve the integration issues itself.

3. Whether, under the Federal Aviation Act, 49 U.S.C. §1486(a), an air carrier can obtain judicial review of Civil Aeronautics Board Orders compelling *de novo* arbitration of certain labor disputes without having initially challenged the legality of general labor protective provisions imposed by the Board in approving a merger of that air carrier.

## Statutory Provisions Involved

Administrative Procedure Act §556(b) (1964).
Federal Aviation Act, 49 U.S.C. §§1302 *et seq.* (1964).
Railway Labor Act, 45 U.S.C. §§151, 151a and 152 (1964).

The pertinent text of these statutory provisions is set forth in the Appendix to the petition for certiorari filed by petitioner Allied Pilots Association, at A1.

## Statement of the Case

On December 31, 1970 the Civil Aeronautics Board (the "Board") approved a merger of Trans Caribbean Airways, Inc. ("TCA") into American

> "* * * subject to the labor protective conditions established by the Board in the *United-Capital Merger Case*, 33 CAB 307 (1961)" (41a, 136a-141a).

For several months prior to the effective date of the merger, March 8, 1971, American had engaged in extensive negotiations with representatives of TCA flight crews and with the exclusive bargaining representatives of its own pilots and flight engineers in order to determine questions relating to the terms and conditions of employment of the former TCA employees with American after the merger. A Memorandum of Understanding was prepared and agreed upon by all parties to the negotiations on all issues with the exception of that portion of the Memorandum which provided the method of determining seniority list integration (155a). On this issue American was in agreement with its pilots, represented by the Allied Pilots Association ("APA") on an integration formula by which seniority was to be determined on the basis of length of service (155a). Under this formula each active TCA pilot would be treated for seniority purposes as if he had started flying for American on the date he started flying for TCA and was given the absolute right to bid the domicile base of his choice in the American Airlines system (153a). The Memorandum also provided that furloughed pilots were to be recalled on the basis of last furloughed, first recalled (155a).

American and APA executed the entire Memorandum of Understanding, dated February 4, 1971, and were subsequently joined by American's flight engineers and by the TCA flight engineers, represented by the flight engineers chapter of the TCA—Master Executive Council ("TCA-MEC") (142a). The TCA pilots, however, continued to insist upon other methods of seniority list integration and refused to agree to this part of the Memorandum. Acting on behalf of these pilots, the TCA-MEC, which was the local unit of the Airline Pilots Association International ("ALPA") that had represented the TCA pilots before the merger, on February 2 filed a petition to the Board asking that three-way arbitration be ordered to resolve all the pending seniority disputes, and for certain interim relief (143a).

Both American and APA opposed the TCA-MEC petition and asked the Board instead to determine whether the method of integrating seniority lists agreed upon by American and APA, after full negotiations with all parties, was "fair and equitable" (144a at pp. 24-25; 150a). On March 5 TCA-MEC again urged arbitration, but also attempted to show that the American-APA agreement was not fair and equitable (175a at pp. 2-10, 18-19). At the same time, TCA-MEC, noting APA's determined opposition to arbitration, suggested that "if APA is serious in its threat that it will refuse to arbitrate no matter what the Board says, the matter may as well" be determined by the Board (175a at p. 19). On April 13 TCA-MEC filed a motion for expedited action, again suggesting that unless an arbitration agreement was executed within 30 days, the Board set the matter down for hearing and decide it (204a).

In the face of these positions, the Board issued Order No. 71-5-30 on May 7. The Order required American to attempt to obtain agreement of all the parties to an arbitration, including implementation of procedures for that arbitration. Failing agreement, American was to itself make all provisions necessary to proceed with the arbitration (A39-40). Furthermore, in the event that any group of employees refused to participate in the arbitration, American was to adopt procedures that would insure "to the maximum feasible extent under the circumstances, that the determination rendered by the arbitral tribunal shall fully consider the interest of such employees" (A40).

Although the Board's Order was directed only at American and did not purport to compel any employee representative to participate in the arbitration, it stated that the determination of the arbitrator was to be "final and binding upon all pilot and flight engineers of American Airlines [including the former TCA employees] as to which there exists a dispute with respect to seniority list integration * * *" (A40). The explicit reasons stated in the opinion for the Board's rejection of a resolution of the disputes by means of its own procedure, as requested by American and APA and agreed to by TCA-MEC, were that arbitration was "appropriate" and that "the Board lacks expertise in labor matters" (A37-38). Also, while the Board noted that TCA-MEC had taken the position that date-of-hire was not a fair and equitable plan, and that American and APA had argued that it was, it failed to resolve this issue, saying that "TCA-MEC need not accept this formula" (A38). As an affected party, under applicable court decisions it had "the right to arbitrate any bona fide dispute of a non-frivolous nature", and "such a dispute exists here" (A38).

On May 28, American filed a petition for reconsideration of the Board's Order (206a). In its petition American pointed out that it was impossible to obtain agreement of the parties to either an arbitration or the procedures necessary to implement such an arbitration; that there was no assurance that an arbitration proceeding would have any final and binding effect and that, to the contrary, holding an arbitration could only lead to further litigation and possible industrial strife; that substantial doubts existed as to the identity of all proper parties and their representatives; and that the precise issues to be submitted to arbitration had not been defined by the Board.

American's petition suggested strongly that the Board take the same action it had taken in the *North Atlantic Route Transfer Case,* 12 CAB 423 (1951); 14 CAB 910 (1951), upheld in *Kent* v. *Civil Aeronautics Board,* 204 F. 2d 263 (2d Cir. 1953), *cert. denied,* 346 U.S. 826, and decide the open question itself. More particularly, it requested the Board to appoint a hearing examiner in accordance with its Rules to conduct further preliminary proceedings in the matter, to identify the parties and their authorized representatives and to determine the extent, if any, to which the seniority provisions in the American-APA agreement were not fair and equitable (206a at p. 12). APA joined in this petition (219a), and TCA-MEC again indicated that it did not oppose resolution of the basic dispute by the Board itself (210a at p. 10), although it asked the Board to ignore the American-APA agreement in reaching its conclusion.

Nevertheless, the Board, on June 11, by Order No. 71-6-71, denied American's petition for reconsideration,

and ordered American to proceed to arbitration within ten days. Once again, although it observed that the former TCA pilots "do not oppose resolution of the dispute by the Board", the Board justified its choice of arbitration over its own resolution of the dispute by stating that "the Board does not consider it appropriate to entertain this dispute beyond directing compliance with the labor protective provisions * * *" (A26), that "seniority disputes are more appropriately resolved by arbitration than by the Board" (A26), and that "we find no merit to APA's contentions that arbitration is an inappropriate means for resolving seniority integration disputes" (A26, fn. 2). The Board also suggested the possibility of the parties seeking judicial review (A27).

The directive to American to arbitrate was substantially identical to Order No. 71-5-30 in that it required American itself to "arrive at appropriate and fair procedures for pursuance of such arbitration", but made no provision for compelling any interested party other than American to participate (A30). With respect to the issue to be arbitrated, the Board was equally vague. It made "clear" only that the "TCA pilots have a right to arbitrate the question whether a different or alternative plan for seniority list integration may be more appropriate" than that agreed on by American and APA (A29).

On June 18 American filed a petition in the Court of Appeals for the Second Circuit to review and set aside Board Orders Nos. 71-5-30 and 71-6-71 on the grounds that in promulgating these Orders, the Board had acted arbitrarily, in abuse of its discretion, and under the circumstances had improperly delegated its authority to a yet

undesignated private arbitrator. The jurisdiction of the Court of Appeals was invoked under Section 1006 of the Federal Aviation Act, 49 U.S.C. §1486 (1964). In conjunction with its petition, American also filed a motion for a stay of the second Order pending determination of its petition to review. American's motion was granted by the Court after oral argument heard on June 21.

On July 23, 1971, the Court of Appeals entered a judgment denying American's petition to review, holding that the Board could properly order arbitration of seniority integration disputes, that it was within the "range of reason" for it to order arbitration in this case and "[w]hat the Board can do, an arbitrator appointed pursuant to its order can likewise do" (A20). The Court also held that in any event, the time for challenging the arbitration clause of the labor protective provisions had expired before the filing of the petition to review. Subsequently, on August 3, 1971, the Court of Appeals denied American's motion to stay the issuance of its mandate pending application to this Court for a writ of certiorari.

## Reasons for Granting the Writ

**1. The Board's Orders, and the decision below upholding those Orders, raise significant and recurring questions with regard to the viability of negotiations as a means for resolution of seniority list integration disputes arising in the course of airline mergers.**

The serious impact of the Board's Orders on the litigants in this case is obvious. The job security of thousands of pilots employed by American will be directly affected by the manner in which seniority list integration is ulti-

mately accomplished. But even more significant, the Board's failure to properly reconcile the policies of the Federal Aviation Act and the Railway Labor Act, and the acquiescence of the Court below in that failure, pose a serious threat that non-governmental compulsory arbitration will supplant negotiation as the means by which virtually all seniority list integration disputes between all types of airline employees will be resolved in future merger cases.

American and APA have urged from the beginning that the Board should consider first whether the collective bargaining agreement they concluded is a fair and equitable arrangement. Yet the Board not only chose to compel arbitration rather than to decide the issue itself, but also chose to say that the entire question of seniority list integration was to be submitted anew, as if no negotiations had occurred and as if no agreement had been reached. Even if these choices were within the Board's power, their exercise under the circumstances here was without justification. This Court has previously recognized that where an administrative agency has a choice between two courses of action, one of which would effectuate the policies of labor statutes involved, and one which would not, the agency is under a duty to consider the consequences of the alternatives and act accordingly. *Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962). The Board's choices in this case seriously impair important and deep-rooted policies of the Railway Labor Act.

Under the Act, the favored method of dispute resolution is negotiation. The negotiation process, in turn, is committed to administration by the *majority* representative of the affected employees. 45 U.S.C. §152 *Fourth*. By ignor-

ing the agreement between American and the exclusive bargaining representative of its pilots, and, indeed, by implying that the arbitrator in the proceeding ordered by the Board also had the right to ignore it, the policy favoring majority representation was subverted, purportedly to protect approximately 150 of American's pilots against the other 3,300, *without any inquiry into the question of whether the agreement treated these employees fairly.* Thus, in effect the Board decreed that *de novo* compulsory arbitration is proper if any minority, no matter how small, fails to agree to any plan, no matter how fair.*

This viewpoint was taken by the Board and tacitly ratified by the Court below without any apparent consideration of its effect in future merger situations. The knowledge that *de novo* compulsory arbitration is inevitable in the absence of complete agreement by all groups will effectively impair the motivation of both majority and minority groups to reach reasonable agreements during negotiations under the Board's labor protective conditions. The negotiations which were held in this dispute provide an apt case in point. APA took a position in negotiations in favor of a date-of-hire concept, one which could hardly be characterized as extreme, and both APA and American made important concessions which, in all probability, would not have been made had compulsory arbitration been contemplated. Because the Board has now held that the re-

* During oral argument counsel for American pointed out that the Board's rationale ("Any affected party has the right to arbitrate any bona fide dispute of a non-frivolous nature" A38) would mean that *de novo* arbitration could have been compelled by any dissatisfied individual in this case even if TCA-MEC had agreed with APA and American. (pp. 12-13R) Neither counsel for the Board nor TCA-MEC answered this contention, and the Court ignored it in its opinion, as it ignored the entire argument.

sults of these negotiations are basically irrelevant, the parties in future merger cases, anticipating arbitration and the tendency of many arbitrators to seek the middle ground, are likely for strategic reasons to hold firmly to one extreme position without compromise as a means of retaining the most favorable position from which to arbitrate.

Yet both the Board and the courts, in prior situations, have recognized the chaotic effect which *de novo* compulsory arbitration at the behest of dissident minority groups may have on the ability to reach a fair negotiated settlement. Thus, in *Outland* v. *CAB,* 284 F.2d 224 (D.C. Cir. 1960) (Burger, J.), the integration of seniority lists was accomplished by a negotiated settlement of the parties. The Board refused to set aside the agreement despite the complaint of a substantial minority of individuals who alleged that the agreement was unfair and inequitable. The Court of Appeals similarly recognized the significance of the negotiations between the carrier and its employees' collective bargaining representative and confirmed the Board's action. That a minority union, rather than a substantial group of individuals, is involved should make no difference, either under the language of the protective provisions or the policy considerations involved in the various statutes that must be accommodated.

Certainly, proper deference by the Board to the agreement reached by American with the majority representative of its combined pilot group would have gone a long way towards encouraging negotiations in future merger situations, for the reasons discussed above. Furthermore, resolution of the dispute by the Board itself (discussed below) would have the supplementary advantage of en-

abling the Board to develop a consistent approach to these problems which would, of necessity, encourage constructive negotiations by narrowing the range of bargaining subjects and by affording fairly predictable results. These goals can hardly be accomplished by submission of all seniority disputes to open-ended standardless *de novo* arbitration.

Review of this case by the Supreme Court will determine whether negotiations between employee groups and air carriers on the important issues of seniority list integration are to be meaningful or a charade. Despite the Board's professed preference for negotiations, its Orders in this case may result in compulsory arbitration for every serious seniority list integration dispute arising among all types of airline employees in merger cases.

**2. The decision below raises significant questions concerning the extent to which an administrative agency can delegate its responsibilities to a private arbitrator.**

Under the Federal Aviation Act, 49 U.S.C. §1301 *et seq.* (1964), the Civil Aeronautics Board is invested with the responsibility to determine whether particular airline mergers are consistent with the public interest, and, if so, to fashion conditions for approval which are just and reasonable. The extent to which this responsibility may be delegated to a non-governmental entity is an issue of great significance to the validity of future actions taken by the Board and other administrative agencies, and is one which is squarely raised by review of the instant case.

The degree of delegation sanctioned by the Board in this seniority list integration dispute is unique for several

reasons. First, the subject matter of the delegation is not, as it has been in many other cases, a mere exercise in fact-finding, or the application of a given formula to a particular situation. Instead, the Board has vested in an unknown arbitrator the power to fashion the general principle which will determine the relative rights of thousands of pilots, by delegating the authority to resolve the "entire question of the appropriate method of seniority list integration" (A29). Presumably, the arbitrator would have the authority under this delegation to decide any issue he desires, as long as it involves "seniority list integration", and any such determination would be final and binding on everyone. The arbitrator could seemingly even come up with an integration formula of his own which bears no relation to the plans advanced by the parties, and this plan would be final and binding.

Furthermore, so broad and encompassing is this delegation that, as counsel for the Board indicated at the oral argument before the Court of Appeals, the parties would be unable to obtain any meaningful review of any arbitral determination by the Board, the agency charged with responsibility for fashioning merger conditions, in the absence of fraud, bad faith, or procedural unfairness (pp. 48-50 R). This abdication by the Board of virtually any control over its delegation is even more remarkable when it is realized that the factors which will come into play in resolving this dispute are in a sense distinctive to the airline industry. For example, the arguments made by TCA-MEC to the CAB with respect to its proposals emphasized the kinds of aircraft flown by the former TCA pilots and their contribution to building up the TCA routes

(175a at pp. 4, 6, 7, 8), while on the other hand, the APA advanced arguments based upon the relative economic conditions of the airlines (144a at p. 7). Another issue, particularly relating to the furloughed pilot question, involves, on the one hand, accusations of improper scheduling by TCA (175a at pp. 13-14) and, on the other, contentions that much of the flying done by the TCA furloughed pilots was temporary military (MAC) flying (161a at pp. 2-5). These are issues that the Board itself deals with all of the time in airline merger cases, and indeed, are issues which it has a responsibility to cope with under the Federal Aviation Act in order to assure that mergers approved by it are consistent with the public interest.

Another factor in this case that makes such broad unfettered delegation to a private arbitrator peculiarly inappropriate is the fact that a major party to the dispute, the APA, which made important concessions during the negotiations, has opposed arbitration from the outset. On the other hand, TCA-MEC has indicated a willingness to participate in and be bound by resolution of the dispute by the Board itself. Lacking a consensual basis for arbitration and possessing an alternative at least palatable to all parties presently on the surface, such broad delegation by the Board becomes indefensible. Arbitration can serve a valid function in a non-consensual situation only if there is no practical alternative for resolving the dispute.

In addition the Board compounded its error, and further burdened the utility of its proposed arbitration, by placing on one party to the dispute, American, the obligation to determine the identity of the employee representatives with

whom it is to arbitrate, the responsibility for selection of the arbitrator, framing of the issues, location of the arbitration, and many other questions which would normally be left to agreement of parties in a totally consensual situation. This action raises many serious problems which the Court below failed to deal with. For example, if American agreed only with TCA-MEC on all of these issues, would it be in compliance with the Board Order? If American disagreed with TCA-MEC on an appropriate method for choosing an arbitrator, or no one was selected on the basis of the method agreed on, would anyone named by American, so long as he had no relation to the parties, be acceptable? And if American and TCA-MEC could not agree on a definition of the issues, could this properly be left to the arbitrator—or to American?

These questions illustrate that broad delegation by an administrative agency without any guidelines, to a private arbitrator, of essentially rule-making powers within that agency's area of expertise, is indefensible where the arbitration must proceed on a non-consensual basis and where the agency has a practical alternative. It is no answer to say that American's acceptance of the labor protective provisions disposes of any questions it may raise at this time. Even if the labor protective provisions constituted an agreement on the part of American to arbitrate seniority list integration disputes, implicit in any such agreement would be that the Board would exercise its statutory responsibilities and provide clear and proper guidelines for the arbitrator's ultimate determination. In addition, any agreement by American to arbitrate could hardly have constituted an agreement that American would assume the

sole responsibility for fairness of the arbitration procedures should the parties fail to agree.

Thus the Court below erred in making and giving weight to a finding that the time for challenging the legality of the arbitration provision in the Order approving the merger had expired before the filing of the petition for review. Indeed, this contention was not raised by the Board in either of its Orders and thus should have been ignored by the Court below. *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 169 (1962); *Trailways of New England, Inc.* v. *C.A.B.,* 402 F.2d 926, 931 (5th Cir. 1969). Moreover, the Board, in denying American's petition for reconsideration, virtually invited judicial review of its Order directing arbitration (A27).

In any event, at no time has American contended that the Board lacked *power* to delegate any conceivable dispute to arbitration. American's position is that considering all of the circumstances *of this case,* the Board acted beyond its powers and abused its discretion. If the Court of Appeals was correct in its view that challenges to an unforeseeable *application* of the protective provisions must be made when the provisions themselves are imposed, a carrier would be unable to challenge any delegation by the Board, regardless of the circumstances, and regardless of how broad that delegation might be, without challenging the entire merger for which it sought the Board's approval.

The breadth of the delegation that the Court below has permitted the Board in this case is sharply focused by its statement that "what the Board can do, an arbitrator can likewise do" (A20). As a generalization, this statement is,

of course, patently incorrect. For example, no one would seriously contend that the Board could delegate its responsibility to approve or disapprove of an airline merger to a private arbitrator. Indeed, the Administrative Procedure Act, 5 U.S.C. §556(b) (1964), providing for the taking of evidence by the agency or hearing examiners, and the Board's own Rules and Regulations, as set out in 14 C.F.R. §302.27, evidence a careful design to assure that any delegation by an administrative agency of any of its functions be under the control and supervision of the agency itself.

There are significant differences between agency determination and resolution by private arbitration which the Court below apparently overlooked. Determination of this issue by the Board offers established procedures, expertise in the airline industry, and a cognizance on the part of the Board that its actions in this case will have precedential effect on future mergers and the way in which it administers the Federal Aviation Act. In addition, as pointed out above, an arbitral determination of this dispute virtually eliminates any possibility of review on substantive grounds. This might not be the case if the agency itself resolved the issue. To place governmental decision making and private compulsory arbitration on an equal footing, as done by the Court below, ignores these differences and opens the door to almost unlimited delegation by administrative agencies of their responsibilities. Review of this case by the Supreme Court will afford an opportunity to delineate the reasonable boundaries of agency delegation for these litigants, for other parties before the Civil Aeronautics Board, and for other administrative agencies in the federal system.

## Conclusion

**For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.**

Respectfully submitted,

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